

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICK E. HIGGINS,

Defendant-Appellee.

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UNPUBLISHED  
February 15, 2007

No. 262756  
Wayne Circuit Court  
LC No. 98-007531-01

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICK HIGGINS,

Defendant-Appellee.

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No. 263966  
Wayne Circuit Court  
LC No. 98-007593-01

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

In Docket No. 262756, the prosecutor appeals as of right a judgment sentencing defendant to 18 months to 20 years' imprisonment for defendant's jury trial conviction of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). In Docket No. 263966, the prosecutor appeals by leave granted from a judgment sentencing defendant to 1 to 30 years' imprisonment for defendant's plea-based conviction of delivery of 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii).<sup>1</sup> We vacate defendant's sentences and remand for resentencing.

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<sup>1</sup> After defendant committed the instant offenses, MCL 333.7401 was amended by 2002 PA 665 to reclassify the amounts of controlled substances necessary for conviction under each subsection. The amendment does not affect these appeals.

At the time defendant committed the instant offenses, MCL 333.7401(2)(a)(iii) required a mandatory minimum sentence of ten years' imprisonment, and MCL 333.7401(2)(a)(ii) required a mandatory minimum sentence of 20 years' imprisonment.<sup>2</sup> The Legislature authorized a sentencing court to deviate from these mandatory minimum sentences, however, if "substantial and compelling" reasons supported the departure. MCL 333.7401(4); *People v Johnson (On Remand)*, 223 Mich App 170, 172; 566 NW2d 28 (1997). In *People v Fields*, 448 Mich 58, 68-69; 528 NW2d 176 (1995), our Supreme Court held that substantial and compelling reasons supporting a departure must be based on objective and verifiable factors. Whether a particular factor exists is a factual determination for the sentencing court that this Court reviews for clear error. *Id.* at 77. This Court reviews as a matter of law a sentencing court's determination whether a particular factor is objective and verifiable. *Id.* at 77-78. Further, we review for an abuse of discretion a sentencing court's determination that substantial and compelling reasons exist to support a departure from a statutory mandatory minimum sentence. *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001). Only in exceptional cases should a sentencing court deviate from a mandatory minimum sentence. *Id.*

The prosecutor argues that the trial court failed to articulate substantial and compelling reasons supporting the downward departures. We agree. The record establishes that the trial court relied on several factors in departing from the mandatory minimum sentences, including defendant's age, his work history with the Department of Transportation, his minimal criminal record, his honorable discharge from the National Guard, the fact he completed over 600 hours of court-ordered community service, and the fact that he owned his own home and was paying taxes at the time of the offenses. These factors are objective and verifiable, and our Supreme Court has specifically approved of the consideration of many of these factors. See *Fields, supra* at 77. Nonetheless, these factors are not substantial and compelling because they do not "keenly" or "irresistibly" grab one's attention and are not "of considerable worth" in determining the length of defendant's sentences. *Id.* at 67. In short, these factors do not render this case "exceptional" such that deviation from the mandatory minimum sentences was justified. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000).

The trial court also relied on the fact that defendant turned himself in to the police and appeared at every hearing since failing to appear at the June 21, 2001 sentencing hearing and remaining a fugitive for over three years. Although this factor is objective and verifiable, it is not a substantial and compelling reason supporting a downward departure because it does not favor defendant. Because defendant's own wrongdoing created the necessity for defendant to turn himself in, this factor does not "keenly" or "irresistibly" grab our attention and should not have been recognized as being "of considerable worth" in determining the length of defendant's sentences. *Fields, supra* at 67. Thus, this factor is not substantial and compelling. *Id.*

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<sup>2</sup> The amendment to MCL 333.7401, enacted pursuant to 2002 PA 665, eliminated the mandatory minimum sentences under that section at issue in these appeals. The amendment does not affect these appeals because it does not apply retroactively. *People v Doxey*, 263 Mich App 115, 123; 687 NW2d 360 (2004).

The trial court also relied to a considerable extent on the actions of James Brian King, the police informant. The court stated:

Okay. In this particular case, as it relates to Case Number 9-8-7-5-3-1 and the factual basis for 9-8-7-5-9-3, I sat and listened as the trial judge for the case that went to trial – again, that’s 7-5-3-1 – heard the motions as they were related to it and specifically heard the testimony of one Mr. King, who is from Western Michigan and from the Grand Rapids area; came to where Mr. Higgins was in the Detroit area.

There were, as I recall, over 60 taped conversations and contacts with Mr. Higgins to try to get Mr. Higgins to sell Mr. King drugs. There were four trips that Mr. King says that he made from the Grand Rapids area to the Detroit area to try to get in contact – well, to get in contact with Mr. Higgins where Mr. Higgins didn’t, quote/unquote, “come through with the promise” that Mr. King had said that he was going to do to sell him cocaine.

Mr. King testified that he had had a prior record for controlled substance and that still with that prior conviction, he was offered 7411 by the judge and received a 7411 sentence for a subsequent drug conviction for which he was trying to work off by finding somebody to get them to cooperate.

Mr. Higgins’ second case, the one that was under advisement for sentencing purposes – and that’s 9-8-7-5-9-3 – also involved Mr. King and also was at or around – or was after this offense where Mr. King was trying to get Mr. Higgins to sell him a greater weight of cocaine. That was just all a part of this, and it happened, if I’m not mistaken, over a five-month period of time.

So it wasn’t a situation where he came in, contacted, quote/unquote, “his source.” He had mentioned that Mr. Higgins had been a friend of his for more than 20 years, and I didn’t find Mr. King’s testimony necessarily to be credible in regards to – I don’t think that it included everything. He was unsupervised when he came to the Detroit area. There was no way for anybody to determine how many phone messages he might have left for Mr. Higgins, but Mr. King estimated it at 60 to 70 phone calls, and I’m sure he low-balled it because he tried to present himself in the best image.

From this reasoning, it appears that the sentencing court adhered to its previous determination, reversed by this Court in *People v Higgins*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2000 (Docket No. 220697), that defendant had been entrapped into committing the cocaine sale at issue in LC No. 98-007593-01. At the very least, the trial court apparently believed that King induced defendant’s actions in both cases. In reversing the lower court’s entrapment ruling, this Court stated that the circumstances of these cases are not unusual and involve a typical situation where an individual charged with a crime agrees to act as a police informant. This Court recognized that before King became an informant, defendant sold cocaine to King intermittently over a 10- to 15-year period. This Court specifically stated that defendant and King were merely “continuing a long-standing course of conduct of defendant procuring cocaine for King, who became a police informant” and

that “[n]either the police’s nor the informant’s actions in furthering this course of conduct can be described as anything other than unremarkable.” *Higgins, supra*, slip op at 2-3. Thus, this Court has previously rejected the lower court’s reasoning that King wrongfully induced defendant’s actions giving rise to these cases.

Moreover, the trial court’s subjective views regarding King’s motives and his purported influence on defendant’s actions are not objective and verifiable, and thus cannot be considered substantial and compelling. *Fields, supra* at 68-69. As such, the trial court erred by relying on this reasoning to support the departures. Because the trial court failed to articulate substantial and compelling reasons supporting the departures, we vacate defendant’s sentences and remand these cases to the trial court for resentencing.

The prosecutor further argues that even if the trial court articulated substantial and compelling reasons supporting the departure, the reasons do not support the extent of the departures. In imposing a minimum one-year sentence in LC No. 98-007593-01, the court departed below the statutory mandatory minimum 20-year sentence by 19 years. In addition, in imposing a minimum 18-month sentence in LC No. 98-007531-01, the trial court departed below the statutory mandatory minimum 10-year sentence by eight years and six months. A statutory mandatory minimum sentence is presumptively proportionate. *People v Perry*, 216 Mich App 277, 284; 549 NW2d 42 (1996). In *Johnson, supra* at 175, this Court recognized that a sentencing “court must consider the *extent* of deviation it orders to avoid imposing a lenient, and hence, disproportionate, sentence.” (Emphasis in original.) Here, the trial court made no effort to justify the extent of the significant departures imposed. Thus, if the trial court finds that substantial and compelling reasons exist to support a sentencing departure on remand, it shall consider the extent of the departure to avoid imposing a disproportionately lenient sentence. See *Perry, supra* at 284.

Remanded for resentencing.

/s/ Kirsten Frank Kelly  
/s/ Alton T. Davis  
/s/ Deborah A. Servitto